

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

FAY MARCUS
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-140
Case No. 72-1037

S.S.A.

WILLIAM MARCUS
(Claimant)

S.S.A. No.

The claimants appealed from that portion of Referee's Decision Nos. ONT-13372 and ONT-13850 which held that the claimants were ineligible for benefits under section 1252 of the Unemployment Insurance Code. The parties were afforded the opportunity to present written argument to this board. Such argument has not been received.

STATEMENT OF FACTS

For the past 15 years the claimants, as husband and wife, have been operating a food concession business that travels with carnivals and fairs. They own and operate their own food trucks and trailers for this purpose.

This is seasonal work which commences each year towards the end of February or the beginning of March and ends some time from September through November, according to the contracts obtained.

Approximately two years ago the claimants incorporated their business. They are the sole stockholders of this corporation. The husband is the president of

the corporation and the wife is the secretary-treasurer of the corporation. They draw a salary only when the food concessions are in operation, and they do not draw a salary during the remainder of the year. During the off-season, the wife handles correspondence which is minimal and the husband, if the occasion should arise, sets up future contracts. The corporation has a certified public accountant taking care of the books and making necessary reports. If the accountant has any question, he usually calls the wife. Also, during the off-season, the husband does overseeing of repairs and cleaning and possible remodeling of the equipment. He hires casual labor to take care of these matters. The husband occasionally goes by the trucks and trailers, which are parked in a lot that he leases during the off-season, to see that they are not broken into. The landlord of this property also occasionally goes by the property and reports to the husband if any of the trucks or trailers have been broken into.

In the past 15 years that the claimants have been in this business, and more specifically in the last ten years thereof, they have never worked at another occupation during the off-season.

REASONS FOR DECISION

Under section 1252 of the code an individual is unemployed in any week during which he performs no services and with respect to which no wages are payable to him, or in any week of less than full-time work if the wages payable to him with respect to that week are less than his weekly benefit amount.

In the present case the claimants control their employment. It is their decision to stop their salaries as corporate officers during the off-season. They alone determine when they will or will not work; how much they will be paid for such work; and, when and for what periods the payments will be made. Though they may engage in little or no activity on behalf of the corporation during the off-season, in their capacity as corporate officers they must be prepared at all times to take appropriate action when the affairs of the corporation so require. In fact, they are in service of the corporation as its officers during the entire calendar year. Although

they receive no salary for such service during the off-season, it was their choice to be paid only during the fair and carnival season.

Factual situations similar to the instant case have been considered by courts in Utah and New York. These decisions hold that the mere discontinuance of work during the off-season or when there is no business activity by a corporate officer who retains control over the corporation and his salary, does not result in the officer being unemployed. (Child v. Board of Review of Industrial Commission (1958), 8 Utah 2d 239, 332 P. 2d 928; Matter of D'Angalo (1960), 11 A.D. 2d 825, 202 N.Y.S. 2d 817; Matter of Lodico (1960), 11 A.D. 2d 873, 203 N.Y.S. 2d 492; Matter of Marvin (1965), 24 A.D. 2d 924, 264 N.Y.S. 2d 665)

We agree with the holdings in the cited decisions. Accordingly, it is concluded that the claimants herein are fully employed during the entire calendar year, and are therefore ineligible for benefits under section 1252 of the code.

DECISION

The portion of the referee's decision on appeal is affirmed. The claimants are ineligible for benefits under section 1252 of the code.

Sacramento, California, May 11, 1972

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

CLAUDE MINARD

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